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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 927

Case No. 1005: ABDUL HALIM ET AL.

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Ghassan Mahmoud Abdul Halim, Mahmoud Mohammed Najia and Immadiddin Shafiq Husary, former staff members of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 November 1997 and 28 February 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 5 February 1998, the Applicants filed an application requesting the Tribunal to order:

"a. Rescinding [the] decisions of the Commissioner-General, and ordering their reinstatement to duty.

b. Considering [the] period of cessation a special leave with full pay.

c. [Compensating them] for injury sustained, including libel and slander ... by Respondent.

d. [That] should Respondent refrain from reinstating Applicants, [he is to pay them their] salaries plus interest until the date of enforcement of judgement.

e. [That the Applicants be paid] secretarial and counseling fees."

Whereas the Respondent filed his answer on 30 July 1998;

Whereas the Applicant filed written observations on 20 April 1999;

Whereas the facts in the case are as follows:

The Applicant Abdul Halim entered the service of the Agency, on 1 November 1984, on a temporary indefinite appointment as an Area staff member in the Technical Department of the Lebanon Field Office, as a Technical Administrative Assistant. On 11 April 1994, he was reassigned from the post of Construction Engineer to that of Assistant Field Technical Officer.

The Applicant Najia entered the service of the Agency on 1 July 1992, on a temporary indefinite appointment as an Area staff member in the Technical Department of the Lebanon Field Office, as an Office Engineer, at the grade 13 level. Effective 1 July 1993, he was promoted to the full grade of the post (grade 14).

On 21 June 1993, the Applicant Husary entered into the service of the Agency, on a temporary indefinite appointment as an Area staff member in the Lebanon Field Office, as a Maintenance Engineer. On 11 April 1994, he was reassigned to the post of Construction Engineer at the Technical Department of the same office.

On 2 September 1995, an article appeared in the Lebanese newspaper *Ad-Diyar* in which it was alleged that staff in UNRWA's Technical Department in Lebanon had received

bribes from contractors. Following publication of this article, the Director of UNRWA Affairs, Lebanon (DUAL), contacted one of the contractors named therein and met with him on 6 September 1995 to discuss the allegation that he had paid bribes to members of the Technical Department. Another meeting took place on 13 September 1995.

On 18 September 1995, the DUAL convened a board of inquiry (BOI) to look into allegations of misappropriation of Agency funds and non-adherence to Agency rules and regulations by the three Applicants. On that day, the DUAL informed each of the Applicants that a charge of serious misconduct had been made against him and that he was suspended without pay pending an investigation of the charges.

On 28 September 1995, the Applicant Abdul Halim wrote to the DUAL seeking a speedy conclusion to the investigation and requested that his suspension from duty without pay be converted into suspension from duty with pay.

On 26 September 1995, the Applicants Najia and Husary each wrote to the DUAL and requested amongst other things, that a speedy conclusion be reached to the investigation and that their suspension without pay be converted to suspension from duty with pay. On 3 October 1995, the DUAL informed each of the three Applicants, "because of the seriousness of the matter being investigated ... [he confirmed] that [he was] suspended without pay pending the final report of the [BOI]."

On 25 October 1995, the BOI submitted its report to the DUAL. The BOI found that since at least 1983, certain staff in the Technical Department had created a "cartel" among contractors and used to distribute UNRWA projects among these contractors. "Authority" to add and/or remove contractors from the list was allegedly vested in Applicant Abdul Halim's and Applicant Najia's hands. The BOI found that "such authority was known to all contractors and threats of removing names of contractors was exercised to insure adherence of the contractors to the extortions exercised by the 'mafia'." By disclosing the Agency's estimate for projects and the total funds available, a contractor would be selected in advance and advised what to submit to the Agency in its tender. The staff members involved would then receive a percentage of the total value of each project.

The Applicant Abdul Halim

The BOI found indications that the Applicant Abdul Halim had received bribes from a contractor, on one project alone amounting to $50,000. It received testimony, documentation and a tape recording allegedly of the Applicant discussing bribes. The BOI also found that he had tried, through an intermediary, to buy the tapes from the contractor. It stated: "Having carefully weighed the evidence ... the [BOI] unanimously concludes that [Applicant Abdul Halim] is guilty of having accepted bribes ..."

On 7 December 1995, the DUAL advised the Applicant of the conclusions of the BOI. The DUAL stated that the BOI's finding that he had accepted bribes constituted serious misconduct and, accordingly, he was summarily dismissed, effective the date of his suspension from duty.

On 2 January 1996, the Applicant wrote to the DUAL and sought reversal of the decision to dismiss him summarily. On 5 February 1996, the DUAL advised the Applicant that his decision stood.

On 12 February 1996, the Applicant Abdul Halim lodged an appeal with the Joint Appeals Board (JAB).

The JAB transmitted its report to the Commissioner-General on 3 March 1997. Its evaluation, judgement, recommendation and dissenting opinion read as follows:

"**III. EVALUATION AND JUDGEMENT**

21. In its deliberations, the Board considered all documents cited before it, including the Appellant's personal file, and came out with the following:

(a) The Board noted that the Administration's decision to summarily dismiss the Appellant was based on the findings of the Board of Inquiry as stated in its report submitted on 25 October 1995.

(b) The said report established the involvement of the Appellant in accepting bribes.

(c) By reference to the report of the Board of Inquiry dated 25 October 1995, the Board noted that based on the statements heard (including that of the Appellant) and the documents considered the Board of Inquiry found out the following:

1. The Appellant admitted in his statement that the voice on the tape was actually his and subsequently the conversation about money with the contractor was true.

2. The Board noted that the relationship between the contractor ... and the Appellant was obviously more than a business relationship, it exceeded to the point were they were negotiating money in the Appellant's house and after work hours.

3. The Board also noted that the Appellant stated that he does not know the contractor well, but he knew him well enough to visit him at home.

The Board also found that the Appellant failed to produce any counter productive evidence.

(d) Based on the above the Board could not establish that the Administration's decision has been biased or improperly motivated against the Appellant.

IV. RECOMMENDATION

22. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Appellant may deem pertinent, the Board by majority vote makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed.

V. DISSENTING OPINION OF BOARD MEMBER ...

I make my reservations regarding the Board of Inquiry's evidence:

(a) It based its findings on a tape which can be easily forged.

(b) It based its findings on the statement of one contractor which is ... against the statement of the Appellant, while there were other statements of other contractors not taken for granted.

> Based on the above findings, I recommended that the administrative decision appealed against be reversed."

On 9 April 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant Abdul Halim and informed him as follows:

> "... I have carefully reviewed the Board's report and noted its conclusions. A majority of the Board considered the evidence against you and was of the opinion that the Board of Inquiry report correctly established that you had accepted bribes. In the absence of any evidence that the decision to dismiss you summarily was taken as the result of bias or any other improper motivation, the majority recommended that your appeal be dismissed. One Board member dissented on the ground that a cassette recording can be fabricated and that the Board of Inquiry's conclusions were based on the evidence of one contractor alone.
>
> I accept the conclusions and recommendation of the majority of the Board and I accordingly dismiss your appeal."

The Applicant Najia

In its report of 25 October 1995, the BOI stated that there was no direct evidence of any contractor having paid any funds to the Applicant Najia. The BOI however, noted an allegation by one contractor who stated that he had once complained to the Applicant Najia about the large percentage in payoffs that the contractor was having to make. The contractor reported that the Applicant Najia instructed him to "talk to [Applicant Abdul Halim] he is in front of you (next office); talk to him directly". The report records that the Applicant Najia denies that such a conversation ever took place.

The BOI was of the opinion that the contractor's testimony "as regards other accused stood the test of comparison" and therefore found it "difficult to believe that [Applicant Najia] was not aware of what was going on. Still with lingering doubts the BOI conclude[d] that no firm evidence ha[d] been presented against [Applicant Najia]".

On 15 January 1996, the DUAL wrote to the Applicant Najia and stated that the BOI was "clearly not satisfied with your role in the events being inquired into, as you described it

and I share their misgivings. The fact that such wrongdoing was being perpetrated and you did not report it constitutes a serious shortfall in the standard of behaviour which should be expected of an UNRWA staff member. This has led me to lose confidence in your ability to continue in your position as Office Engineer". The DUAL stated that therefore he had decided to transfer the Applicant to the grade 10 position of Administrative Assistant in the Printing Services Office, with salary protection at his then grade 14 level.

By letter dated 12 February 1996, the Applicant Najia requested the DUAL to reverse the decision to transfer him calling it a transfer on demotion. The DUAL replied on 14 February 1995, informing the Applicant that he had reviewed the decision to transfer him and it would be maintained. On 12 March 1996, the Applicant Najia lodged an appeal with the JAB.

On 30 May 1996, the Field Personnel Officer informed the Applicant Najia that his post would be abolished as from 30 June 1996. On 14 October 1996, the Applicant was informed that effective that day, he would be reassigned to the newly established fixed-term supernumerary post of Administrative Assistant, at the grade 10 level, which would expire 13 August 1999, with no change in grade or salary.

On 11 November 1996, the Applicant Najia wrote to the Field Personnel Officer and requested to be maintained in his present employment category which was of a temporary indefinite basis. He also requested reinstatement to the post of Office Engineer. The Field Administration Officer (FAO) replied to the Applicant on 19 November 1996 stating that "although [he was] transferred to a fixed term post ... [his] employment status remain[ed] on a temporary indefinite basis." If the fixed term post that he currently occupied expired, then he would be reassigned to another vacant post. The Applicant was advised that unless he reported for duty on 21 November 1996 his appointment would be terminated on grounds of abandonment of post.

On 25 November 1996, the Applicant again wrote to the FAO objecting to his transfer and requesting reinstatement to the post of Office Engineer. On 28 November 1996,

the FAO responded that the post that the Applicant was being transferred to "ha[d] the same occupation group" as the one previously held by [him] while working at the Printing Unit.

On 16 December 1996, the Applicant Najia wrote a memorandum to the FAO seeking transfer to his original post or, in the alternative, termination of his services "on grounds of redundancy without prejudice to [his] appeal ..." On 6 January 1996, the Applicant wrote a letter to the DUAL referring to his previous correspondence with the FAO and requesting that he be immediately terminated on grounds of redundancy without prejudice to his appeal. The Applicant added "[s]hould you have no decision with[in] the forthcoming two days please consider the attached letter of resignation a part and parcel of this letter". On 22 February 1997, the FAO advised the Applicant Najia that his resignation had been accepted effective 20 January 1997.

The JAB transmitted its report to the Commissioner-General on 3 March 1997. Its evaluation, judgement, recommendation and dissenting opinion read as follows:

"**III. EVALUATION AND JUDGEMENT**

22. In its deliberations, the Board examined all documents cited before it, including the Appellant's personal file, and came out with the following:

(A) The Board noted that the Administration's decision to impose disciplinary measures on the Appellant was based on the findings of the Board of Inquiry as stated in its report submitted on 25 October 1995.

(B) The said report established that the Appellant was aware of what was going on and found it difficult to believe the contrary.

(C) The Board also took note of the conversation that he admitted took place with the contractor two days after his suspension did cast some shadow of doubt on the Appellant's behaviour.

The Board also noted that the Appellant failed to produce any counter productive evidence.

In this context, the Board is of the opinion that the Administration has acted within the framework of standing rules and regulations accordingly, the Board

could not establish that the Administration's decision to transfer the Appellant was motivated by prejudice or any other extraneous factors.

IV. RECOMMENDATION

23. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Appellant may deem pertinent, the Board by majority vote makes its recommendation that the administrative decision appealed against be upheld and that the case be dismissed.

V. DISSENTING OPINION OF BOARD MEMBER ...

I make my reservations regarding the findings of the Board of Inquiry in which it established that no firm evidence has been presented against the Appellant.

Furthermore, the said report established that the words of an outside contractor stood the test of comparison against the word of an employee i.e. the Appellant which in my opinion is the one who should be believed.

Based on the above, I cannot accept the findings of the Board of Inquiry. Therefore, I recommend that the administrative decision of transfer by reversed."

On 9 April 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant Najia and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. A majority of the Board was of the opinion that the Board of Inquiry had established that you knew of the corrupt scheme operating in your Department and that you had not produced any evidence to the contrary. The majority also opined that the Agency had acted in accordance with the Rules and the decision to transfer you was taken without prejudice or any other extraneous factors. Accordingly, the majority recommended that your appeal be dismissed. One Board member dissented on the ground that no firm evidence had been presented against you and that the Board of Inquiry's conclusion was based on a conversation you had had with a contractor, of which both of you gave conflicting versions. The dissenting member was of the view that in those circumstances, a staff member's version should always be accepted in favour of that of a non-staff member.

I have accepted the view of the majority of the Board because it is consistent with your obligation in the rules to show that the decision under review should be changed or reversed. I do not accept the view of the dissenting member regarding the relative trustworthiness of staff members and non-staff members. Accordingly, I dismiss your appeal."

The Applicant Husary

In its report of 25 October 1995, the BOI stated that "[n]o contractor claims to have paid any funds directly to [Applicant Husary]". However the BOI took note of the allegations of one contractor. Its report says that this contractor "claims that he on one occasion said to [the Applicant] that the percentage [being demanded as bribe] had become high incurring a loss. According to [the contractor], [the Applicant's] reply was 'talk to Ghassan [Applicant Abdul Halim]' ..." The report notes that the Applicant Husary confirmed that the contractor had told him he was paying the Applicant Abdul Halim and that he did not report the incident to his supervisor as he considered it to be "nonsense". The BOI concluded that Applicant Husary should have reported the contractor's statement to the Field Technical Officer (FTO) and it unanimously found that "in not reporting the incident [Applicant Husary] was derelict of duty".

On 7 December 1995, the DUAL informed the Applicant Husary of the BOI's finding. The DUAL stated that in light of those findings he had lost confidence in the Applicant's ability to continue in his position as Construction Engineer, and had therefore decided to terminate the Applicant's appointment in the interest of the Agency, effective the date of the Applicant's suspension from duty.

On 18 December 1995, the Applicant wrote a letter to the DUAL objecting to his termination which he called arbitrary, claiming that the statements were made to him by the contractor in public and not in confidence and the same statements had been published in the press earlier. He therefore requested reversal of the decision to terminate his appointment. The DUAL responded on 19 December 1995 stating that the decision to terminate the Applicant would be maintained.

The Applicant Husary lodged an appeal with the JAB on 2 January 1996. The JAB transmitted its report to the Commissioner-General on 3 March 1997. Its evaluation, judgement and recommendation reads as follows:

"**III. EVALUATION AND JUDGEMENT**

22. In its deliberations, the Board examined all documents cited before it, including the Appellant's personal file, and came out with the following:

(a) The Board noted that the Administration's decision to terminate the Appellant's services in the interest of the Agency under Area staff regulation 9.1, was utterly based on the findings of the report of the Board of Inquiry dated 25 October 1995, in which the Appellant was held responsible for not reporting the incident which he admits took place, where a contractor came to him and informed him that he was paying bribes to another colleague.

(b) Based on the provided evidence and the inquiry conducted, the Board noted that the not reporting an incident does not deserve termination in the interest of the Agency.

(c) By reference to the Appellant's personal file the Board noted that he has a satisfactory performance all through his service with the Agency, which should be taken into consideration.

(d) Based on the above, the Board is of the opinion that the Appellant does not deserve such harsh disciplinary measures.

IV. RECOMMENDATION

23. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed."

On 9 April 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant Husary and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board was of the opinion that your failure to report a conversation was not, of itself, a sufficient basis upon which to terminate your services. The Board also noted that your service with the Agency had been satisfactory. Accordingly, the Board recommended that your appeal be upheld and that the administrative decision be reviewed.

Ordinarily, I would agree with the Board's perception as to the consequences of failing to report a conversation; however, the subject matter of the conversation, namely that a staff member was receiving payments from a contractor associated with an UNRWA contract, was of such a nature that it should have prompted you to report the incident so that it could be properly investigated. Your explanation, that you did not take the conversation seriously, has proved to be serious error of judgement as evidenced by the findings of the Board of Inquiry which the Joint Appeals Board has, in relation to two other staff members accepted.

Accordingly, I cannot accept the conclusion and recommendation of the Board and I dismiss your appeal."

On 5 February 1998, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicant Abdul Halim's principal contentions are:

1. The Respondent's decisions to suspend and later to summarily dismiss him, as well as the proceedings of the BOI, were based on bias and prejudice as well as influenced by extraneous factors.

2. The evidence upon which the BOI made its conclusions regarding him was insufficient and he is not guilty of the charges alleged.

Whereas the Applicant Najia's principal contentions are:

1. The proceedings of the BOI, and the Respondent's decision to suspend him without pay were based on bias, prejudice as well as influenced by extraneous factors.

2. The Respondent's decision to transfer him was arbitrary and placed him in a post incommensurate with his qualifications. The said decision and the Respondent's actions thereafter were calculated to leave the Applicant no choice but to resign.

Whereas the Applicant Husary's principal contentions are:

1. The proceedings of the BOI and the Respondent's decision to suspend him without pay were based on bias, prejudice and influenced by extraneous factors .

2. The information he was accused of failing to disclose was already in the public arena when he received it and therefore the Respondent's decision to terminate his services was based solely on prejudice.

Whereas the Respondent's principal contentions are:

1. In the case of each of the Applicants, the decision to suspend him from duty pending the outcome of investigations was a proper exercise of managerial discretion by the Respondent.

2. In the case of the Applicant Abdul Halim, the decision to summarily dismiss him was a proper exercise of managerial discretion based on the findings of the BOI.

3. In the case of the Applicant Husary, the decision to terminate his appointment in the interests of the Agency was a proper exercise of managerial discretion based on the findings of the BOI.

4. The decision to transfer the Applicant Najia was a proper exercise of managerial discretion. The Applicant Najia's resignation was not a *de facto* termination but rather a choice made by him to avoid performing the work assigned to him.

5. None of the Applicants has provided any evidence to prove that the findings of the BOI and the decisions relating to them were based on bias, prejudice or influenced by other extraneous factors.

The Tribunal, having deliberated from 5 to 30 July 1999, now pronounces the following judgement:

I. The Applicants Abdul Halim, Najia and Husary have filed a joint application. Because the three Applicants' cases arise from related facts and raise similar issues, the Tribunal orders joinder of the cases.

Ghassam Mahmoud Abdul Halim

II. The Tribunal's task in relation to this case has not been made any the easier by virtue of the fact that the submission filed on behalf of the Applicant Abdul Halim is shrouded in a haze of unsubstantiated and vague allegations made against other parties, conjecture, selective quotations from documents, and a general "scattergun" attack made against the BOI, the JAB and the Respondent.

III. Effective 1 November 1984, the Applicant Abdul Halim was offered and accepted a temporary indefinite appointment as an area staff member of UNRWA as Technical Administrative Assistant. On 11 April 1994, he was reassigned to the post of Assistant Field Technical Officer.

IV. On 18 September 1995, the DUAL convened a BOI to look into allegations of misappropriation of Agency funds and non-adherence to Agency Regulations and Rules. The Applicant Abdul Halim was informed that a charge of serious misconduct had been made against him and was suspended without pay pending the investigation of the charges. Area staff rule 110.2 provides that if a charge of misconduct or serious misconduct is made against a staff member and the Commissioner-General considers that the charge is "prima facie" well founded or that the staff member's continuance in office pending an investigation of the charge would prejudice the interest of the Agency, then the staff member may be suspended from duty, with or without pay, pending investigation, the suspension being without prejudice

to the rights of the staff member. The Tribunal is satisfied that the said decision to suspend the Applicant Abdul Halim was accordingly lawful. The terms of reference of the BOI were: (a) "The accusations made by a Contractor on UNRWA's List of Contractors and the related material presented", (b) "All documents and files of Technical Office to conclude on the misappropriation of Agency funds and non-adherence to Agency Rules and Regulations". It was later agreed to widen the investigation to include the Sanitation Division in the Health Department.

V. In essence two contractors accused the Applicant Abdul Halim of having led a ring or "cartel" which imparted confidential and sensitive information to contractors as to the Agency's estimates for particular projects and the amount of funds available to finance them. Such contractors who received contracts were required to pay commissions based on an agreed percentage of contract values to the Applicant Abdul Halim in return for that information. The main evidence against the Applicant Abdul Halim was the testimony of one of the two contractors, a tape recording (two tapes) furnished by that contractor allegedly containing a recording of conversations between himself and the Applicant Abdul Halim, and the testimony of the other contractor. The first mentioned contractor also claimed that he had been paid through an intermediary an amount of $10,000, alleging that the Applicant was seeking to purchase back from him (the contractor) the tape recording which was ultimately produced before the BOI. In this testimony, the alleged intermediary admitted that he had paid $10,000 to the first mentioned contractor but provided no credible explanation as to why this sum had been paid. The BOI, having indicated that they had carefully weighed the evidence from the written statements, the tape and the interviews, unanimously concluded that the Applicant Abdul Halim was guilty of having accepted bribes from contractors. After hearing the tapes in question the Applicant Abdul Halim is said to have agreed that his voice was on the tapes and that it was "clear in some areas" but he stressed that that did not mean that the conversation was genuine. On the contrary he claimed that the conversations were fabricated, that the tapes had been interfered with and that it would be easy to produce such a

tape from fractions of other conversations. The Applicant Abdul Halim alleges that therefore the tapes at issue were not admissible as evidence.

VI. Whilst the Tribunal recognises that an audio tape can be interfered with, the Tribunal is satisfied that both the BOI and the JAB thoroughly considered the allegation of interference and treated the tape as part of the evidence. The BOI had obviously played the tapes and had heard the Applicant Abdul Halim giving evidence, and thus the BOI was in the position to assess and to form its own views as to when the Applicant Abdul Halim's voice was or was not identifiable. The fact that an audio tape can be subjected to interference or manipulation is not, in the opinion of the Tribunal, a good ground for declining to act on such evidence provided it is properly considered. It is also clear that the BOI did not act on the tape alone but also considered the testimony of the two contractors who had implicated the Applicant Abdul Halim as well as of the alleged intermediary. The BOI took the view that the alleged intermediary's denial that he had ever acted as such, was wholly unsatisfactory. It considered his evidence of having made that payment to be of relevance, as he failed to give any innocent explanation for having done so. The BOI also found that such reasons as were given by him, which did not implicate the Applicant Abdul Halim, were "totally illogical and incomprehensible". The BOI, being unable to understand why this alleged intermediary had made this payment to the contractor, was driven to conclude that the alleged intermediary had in fact acted as a middleman on behalf of the Applicant Abdul Halim in an attempt to retrieve the tapes. The Tribunal is satisfied that this was a reasonable inference to draw from the evidence which entitled the BOI to conclude that the tapes were genuine insofar as they recorded the Applicant Abdul Halim discussing what were in effect bribes.

VII. The BOI's finding that the Applicant Abdul Halim had indeed accepted bribes clearly entitled the Respondent to form the view that he was guilty of serious misconduct and decide that he be summarily dismissed.

VIII. The Applicant Abdul Halim appealed to the JAB. The JAB, by a majority, was of the opinion that the BOI report correctly established that the Applicant Abdul Halim had accepted bribes. One member dissented on the grounds that a cassette recording can be fabricated or interfered with and that the BOI's conclusions were based on the evidence of one contractor alone. It is clear from the report that the BOI's conclusions had in fact been made on the consideration of the entirety of the evidence and not on consideration of the tapes alone. The Tribunal is satisfied that it was reasonable for the Respondent on reviewing the report of the JAB to agree with the recommendations and conclusions of its majority and accordingly to affirm its decision.

Whilst allegations of a vague and generalised nature have been made on behalf of the Applicant Abdul Halim against the procedures followed by the BOI and its reasoning in accepting some evidence at the price of rejecting other evidence, the Tribunal is satisfied that the Applicant Abdul Halim has failed to establish any departure from fair procedures, or bias or prejudice against him or any other extraneous factors which might have precluded either the majority of the JAB or the Tribunal from relying on the findings of the said BOI. Likewise the Tribunal is satisfied that the Applicant Abdul Halim has failed to establish any departure from fair procedures or bias or prejudice against him by the JAB and accordingly the Tribunal is satisfied that the Applicant Abdul Halim has failed to establish any grounds which could negate the findings accepted by the Respondent that he had been guilty of serious misconduct in accepting bribes.

Mahmoud Mohammed Najia

IX. The Applicant Najia, an Office Engineer, was also one of the persons investigated by the BOI. This case involves a direct conflict of evidence, based on one man's word against another's. It was alleged that the Applicant Najia was a member of the "Cartel" allocating projects to contractors after providing them with the Agency's estimate and information regarding the funds available for the project. At the same time, there was no evidence that he had received or accepted any monies. One of the contractors who testified against the

Applicant Abdul Halim claimed that he had complained to the Applicant Najia that the Applicant Abdul Halim was making problems for him. He alleged that the Applicant Najia told him to take up his problems with the Applicant Abdul Halim directly. The Applicant Najia testified that that same contractor had apprised him of a problem between himself and the Applicant Abdul Halim and that he had replied that whatever problem there was between contractor and the Applicant Abdul Halim "was not his problem". Whilst the BOI did not make any finding that the Applicant Najia had participated in corrupt practices or received any bribe it "unanimously [found] it difficult to believe that [the Applicant] Najia was not aware of what was going on. Still with lingering doubts the Board conclude[d] that no firm evidence ha[d] been presented against [the Applicant] Najia".

X. This finding caused the Respondent to lose confidence in the Applicant's ability to continue as Office Engineer. He found that his failure to report the wrongdoings of his colleagues constituted a serious shortfall in the standards of behaviour expected of him and he transferred him to the post of Administrative Assistant in the Printing Unit. Although this was a grade 10 post, whereas his previous post was grade 14 level, he was placed on salary protection at grade 14 level so that the transfer did not result in any economic loss.

XI. The Applicant Najia appealed to the JAB. The majority of the JAB was of the opinion that the BOI had established that the Applicant Najia knew of the corrupt scheme operating in his department, that the Agency had acted in accordance with the rules and that the decision to transfer the Applicant Najia to another post was taken without prejudice or any other extraneous factor and was lawful. Accordingly, the majority of the JAB recommended that his appeal be dismissed.

One Board member dissented on the ground that no firm evidence had been presented against him and that the BOI's conclusions were based on a conversation which was the subject matter of a conflict. The dissenting JAB member preferred the Applicant Najia's version to that of the contractor and accordingly recommended that the decision to transfer the

Applicant Najia be reversed. As he put it in his dissenting opinion "Furthermore, [the Report of the BOI] established that the word of an outside contractor stood the test of comparison against the word of an employee i.e. the Appellant which in my opinion is the one who should be believed". In the view of the Tribunal, this means no more than that the dissenting member preferred the word of the Applicant Najia to the word of the "outside contractor". He did not seek to announce a principle of general application. The Tribunal notes that the Respondent misunderstood or misrepresented the dissenting member's opinion as is evidenced by the letter of the Commissioner-General to the Applicant Najia dated 9 April 1997 where he states: "... The dissenting member was of the view that in those circumstances, a staff member's version should always be accepted in favour of that of a non-staff member."

As indicated, the dissenting member of the JAB did not say that in the circumstances of the case that a staff member's version should always be accepted in favour of that of a non-staff member. However, the Tribunal is of the view that the Commissioner-General was entitled to accept the view of the majority, which he did, and the mere fact that he misunderstood or misrepresented the view of the dissenting member is of no consequence.

XII. On 30 May 1996, the Applicant Najia was informed that the post which he then occupied in the Printing Unit was being abolished with effect from 30 June 1996 and advised that every effort would be made to secure a post for him within the Agency which would suit his qualifications and experience. He was further informed that a failure to secure a post as of the latter date would regretfully result in the termination of his services for redundancy. He sought reinstatement to his previous post as Office Engineer which was still vacant but this was refused as the Respondent had not regained confidence in him. Effective 14 October 1996, he was offered a post of Administrative Assistant, grade 10, that would expire on 13 August 1999, with no change in his grade or salary level. He ultimately declined to take up this post as he considered that it was not commensurate with his qualifications and

was therefore unacceptable. Claiming abuse of authority and discrimination, he argued that the Respondent's actions were in fact an attempt to dismiss him. In the circumstances he resigned with effect from 20 January 1997.

XIII. The Tribunal is satisfied that the Respondent was entitled to take the view that the Applicant Najia should be transferred from the Technical Department to another Unit and the Applicant Najia has failed to establish that there was any bias or prejudice or extraneous influence in arriving at that decision. Likewise, the Tribunal is satisfied that the Applicant Najia's resignation was not procured or made in circumstances that could entitle the Tribunal to find that he was constructively dismissed.

Imadiddin Shafiq Husary

XIV. The Applicant Husary was likewise a subject of the BOI investigation. As earlier noted, the BOI had been convened to look into allegations of misappropriation of agency funds and non-adherence to Agency Regulations and Rules. The DUAL, when writing to the Applicant Husary on 18 September 1995, informed him that a charge of serious misconduct had been made against him and added "Specifically, it is alleged that on several occasions you have misused the Agency's funds".

XV. On 11 April 1994, the Applicant Husary was assigned to the post of Construction Engineer. Again, whilst no specific allegation is made, the submission indicates that this is an appeal against arbitrary suspension without pay and termination of services. It is sufficient to refer once again to Area staff rule 110.2 which has been recited above and to reiterate that the Commissioner-General was entitled to consider the charge as "prima facie" wellfounded or that the staff member's continuance in office pending an investigation of the charge would prejudice the interests of the Agency and, therefore, entitled to suspend the Applicant Husary from duty without pay, pending investigation.

XVI. Throughout the investigation carried on by the BOI no person claimed to have paid any funds directly to the Applicant Husary. The sole finding made by the BOI in relation to the Applicant Husary was that he should have reported the statement by a contractor that he was paying the Applicant Abdul Halim to the FTO and that, in not reporting this incident, the Applicant Husary was in dereliction of duty. This finding arose on the testimony given by the said contractor that he on one occasion told the Applicant Husary that the percentage of the contract value which he was paying to the Applicant Abdul Halim had become high and that he was thereby incurring a loss. The contractor stated that the Applicant Husary had replied "Talk to Ghassan," meaning to the Applicant Abdul Halim. In the course of his testimony, the Applicant Husary explained to the BOI that the said contractor had indeed once told him he was paying the Applicant Abdul Halim and said his reply was "What goes on between you and Ghassan does not concern me". He further explained to the BOI that he had not reported the incident to his supervisors as he considered it to be nonsense. The Tribunal considers it beneficial to quote more precisely from the testimony which had been given by the Applicant Husary to the BOI:

> "...
>
> Question: Asaad Mustafa claims that he came one day to the Technical Department and said to you verbatim, that the percentage demanded of him had become high and he was incurring a loss; your response was to tell him to talk to Ghassan?
>
> Answer: He came once and said to me, verbatim, that he was paying Ghassan. I told him that what goes on between you and Ghassan does not concern me. I told him, if Ghassan really collects from you, he would have asked for my help.
>
> Question: Did you relay this serious talk to your superiors?
>
> Answer: No.
>
> Question: Didn't you feel that this accusation affecte[d] you?

Answer: No, because there is nothing between him and me. There were problems in the work and we solved them.

Question: Don't you think that this serious accusation against a friend in the work should, at the very least, elicit a reaction? Towards the contractor, towards your accused friend, or even towards the Agency's supervising public funds?

Answer: First of all, the actual work was very good. In the terms of protecting UNRWA, no UNRWA funds were washed. For the amount of work he did, he was paid. As to the quality of the work, it was very good. If Ghassan was involved with him, he would have asked me to cover up for his work. But he didn't ask anything of me, and the work was very good. So far as I was concerned his (Asaad's) talk was nonsense.

Question: You took the matter lightly when Asaad told you about Ghassan, which gives the impression that you knew about this (the pay offs). Do you suspect, or are you aware of, other persons in the Technical Department receiving bribes from any contractor?

Answer: Asaad's words cannot be taken seriously. I do not know and I do not suspect anyone in the Technical Department of receiving bribes. Because our work is implemented according to the specifications and to the finest detail.

..."

Accordingly, the Tribunal notes that, whilst the BOI was originally investigating an allegation that the Applicant Husary had misused Agency funds, there was no evidence of such misuse by him and the only finding made against him was one of dereliction of duty in failing to report the conversation which he had had with the contrator concerning his alleged troubles with the Applicant Abdul Halim.

XVII. The DUAL, having considered the report of the BOI, wrote to the Applicant Husary on 7 December 1995, informing him that, in the light of the BOI's finding that he was derelict in his duty in not reporting an incident, he had lost confidence in his ability to continue in his

position as Construction Engineer. He had therefore decided with regret that he had no alternative but to terminate his appointment in the interest of the Agency under the provisions of Area staff regulation 9.1, effective the date of his suspension from duty. It should be pointed out that in that letter he selectively quoted from the evidence which had been heard by the BOI. He quoted merely the fact that, when approached by a contractor who had told him in effect that he was paying bribes to the Applicant Abdul Halim, his reply was "What goes on between you and Ghassan does not concern me". He failed to quote what the Applicant Husary had said thereafter, namely that he did not believe that bribes were being paid and that he considered that the contractor's allegation was nonsense. This omission may have some significance in determining the attitude of the DUAL towards the Applicant Husary and towards the findings of the BOI.

XVIII. Whilst Area staff regulation 9.1 does provide that "the Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency", it should be read in conjunction with personnel directive A/10/Rev.1/Amend.1 of 24 July 1992 which deals with disciplinary measures. Paragraph 4.4 of the Personnel Directive provides that cases that are likely to lead to the application of disciplinary measures vary in nature and degree of seriousness but that every effort should be made to maintain consistent patterns of disciplinary action for similar types of offences. Paragraph 4.5 provides that disciplinary measures should normally be imposed in a progressive fashion as outlined in paragraph 6. The specific disciplinary action need not follow the programme sequence as outlined but will depend on the particular circumstances of the case. Paragraph 6 then sets out five forms of disciplinary measures in order of severity, starting with written censure followed by suspension without pay, demotion, termination for misconduct and, finally, summary dismissal. It is apparent from the documentation that the Applicant had a previously unblemished record. The decision of the Respondent to terminate his appointment in a summary fashion accordingly could be equated with the fifth and final measure as set out in paragraph 6 above. It was also a decision which

was markedly more severe than the decision made in relation to the Applicant Najia.

XIX. Accordingly, the Tribunal is satisfied that the decision to terminate the appointment of the Applicant Husary was very severe, especially when one contrasts his "dereliction of duty" against the finding made by the BOI in relation to the Applicant Najia who was dealt with by a mere transfer and demotion. This is doubly so when one contrasts the finding made against the Applicant Husary (i.e. the failure to report a conversation which he says he did not believe was true) against the implicit finding made by the BOI in relation to the Applicant Najia (i.e. that he was fully aware of corrupt practices within the Technical Division and that he failed to report them). To this there may be added the point submitted by the Applicant Husary, namely that the matter which he failed to report to his superiors had earlier been placed into the public arena and accordingly was known to his superiors. That matter had been made known in more specific detail in articles published in the public press, and it is alleged that this publicity was given well before the conversation which had occurred between the above-mentioned contractor and the Applicant Husary. The BOI is unable to find a date upon which the conversation is alleged to have taken place, although this issue was raised by the Applicant Husary in correspondence before the JAB was convened. If there had been evidence to show that the conversation had predated the press publicity one would imagine that the Respondent would have sought to adduce this evidence or to have made this point before the JAB.

XX. The Applicant Husary appealed to the JAB. The JAB noted that the decision to terminate the Applicant's services in the interests of the Agency under Area staff regulation 9.1 was solely based on the findings of the BOI. It concluded that based on the evidence before the BOI the Applicant's failure to report the conversation with the contractor did not warrant termination in the interests of the Agency and it expressed the opinion "that the [Applicant did] not deserve such harsh disciplinary measures". It unanimously recommended that the decision appealed against be reviewed.

XXI. In his letter to the Applicant of 9 April 1997, the Commissioner-General stated, inter alia, as follows:

> "...
>
> Ordinarily, I would agree with the Board's perception as to the consequences of failing to report a conversation, however, the subject matter of the conversation, namely that a staff member was receiving payments from a contractor associated with an UNRWA contract was of such a nature that it should have prompted you to report the incident so that it could be properly investigated. Your explanation, that you did not take the conversation seriously, has proved to be a serious error of judgement as evidenced by the finding of serious misconduct by the Board of Inquiry which the Joint Appeals Board has in relation to two other staff members, accepted.
>
> ..."

XXII. The Tribunal notes that the Commissioner-General's views were partially influenced by hindsight. This is apparent from his statement that the Applicant Husary's failure to report the conversation proved to be a serious error of judgement as evidenced by the findings of serious misconduct by the BOI. In addition, the Tribunal notes the description of the Applicant's conduct as "a serious error of judgement". The Tribunal is satisfied that a single error of judgement, no matter how serious, in relation to a person with an unblemished record, would not ordinarily result in or merit such a loss of confidence as would justify termination amounting to summary dismissal. The Tribunal further notes that the wheels had been put in motion by the decision initially made by the DUAL who had selectively quoted from the Applicant Husary's evidence which put him in an unduly unfavourable light. The DUAL had noted that the Applicant indicated that he did not wish to interfere with another man's business, but he failed to quote the further explanation that he had not believed the allegations and considered them to be nonsense.

The Tribunal would not normally interfere with a decision to terminate an appointment by reason of a loss of confidence, unless there was convincing evidence that the decision was substantively or procedurally defective or motivated by some improper motive.

In this case, it is satisfied that the decision taken in relation to this Applicant was so excessively harsh as to warrant setting it aside, particularly when contrasted with the measures which were taken against the Applicant Najia and when one considers the Applicant Husary's full reasons for having failed to make such a report. One cannot gainsay the Applicant's evidence that he did not believe the allegations and considered them to be nonsense. The Tribunal further considers that a loss of confidence such as is claimed by the Respondent as grounds for his decision can hardly be justified, in the light of the Respondent having characterized the Applicant Husary's offence as merely a serious error of judgement.

The Tribunal has concerns and reservations as to whether the findings of the BOI adverse to the Applicant, namely his failure to report the contractors allegations to his superiors, should be characterized as serious misconduct, particularly when it has been described by the Respondent as, in hindsight, a serious error of judgement. The Tribunal is of the opinion that it would have been more appropriate for the Respondent to view it as a performance matter appropriately dealt with by administrative action as done in the case of the Applicant Najia. Had it been dealt with as a performance matter, the Tribunal considers it highly unlikely that it would have resulted in the termination of the Applicant's appointment.

XXIII. For the foregoing reasons, the Tribunal orders:

(a) That the pleas of the Applicants Abdul Halim and Najia are rejected in their entirety;

(b) Reinstatement of the Applicant Husary in a post equivalent to the status or rank of the post which he formerly held;

(c) Should the Respondent decide against reinstatement of the Applicant Husary, it orders that he be compensated in an amount equivalent to two years' net base salary at the rate in effect on the date of separation; and

(d) Rejects all other pleas, including the request for costs and expenses.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

Geneva, 30 July 1999

Maritza STRUYVENBERG
Executive Secretary